STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION 494, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,	:	
Complainant,	:	Case I No. 23418 Ce-1791
vs.	:	Decision No. 16513-D
GIRAFFE ELECTRIC, INC.,	:	
Respondent.	:	

Appearances:
Goldberg, Previant, Uelmen, Gratz, Levy, Miller & Brueggeman, S.C., by Mr. Gerry M. Miller and Mr. Scott D. Soldon, for Complainant.
Von Briesen & Redmond, S.C., by Mr. Douglas A. Cairns and Mr. Donald J. Cairns, for Respondent.
Michael, Best & Friedrich, by Mr. Thomas W. Scrivner, for National Electrical Contractors Association-Milwaukee Chapter.

SUPPLEMENTAL FINDINGS OF FACT, SUPPLEMENTAL CONCLUSIONS OF LAW AND ORDER

Examiner Stuart S. Mukamal, having issued his Findings of Fact, Conclusions of Law and Order in the above-entitled matter on May 16, 1979; and a hearing having been held on the matter before the Labor-Management Committee for the Electrical Contracting Industry of Milwaukee, herein referred to as the Committee, in compliance with the Examiner's Order, and the Committee having rendered its decision in the matter on July 6, 1979; and the above-named Respondent having failed to comply with the terms of said decision; and the above-named Complainant having on November 13, 1979 filed an amended complaint with the Wisconsin Employment Relations Commission, herein referred to as the Commission, as a result of the failure of the Respondent to comply with the terms of the Committee's decision; and the Respondent having filed its answer to the amended complaint on November 20, 1979; and further hearing on the matter having been held before the Examiner on January 3, 1980 in Milwaukee, Wisconsin after which the parties having filed briefs, the last of which was received on March 4, 1980; and the Examiner having considered the evidence and arguments of counsel, makes and issues the following Supplemental Findings of Fact, Supplemental Conclusions of Law and Order.

SUPPLEMENTAL FINDINGS OF FACT

1. Those Findings of Fact contained in the Examiner's decision of May 16, 1979 and numbered paragraphs 1 through 22 are incorporated by reference as though fully set forth herein, are restated in their entirety as Findings 1 through 22 herein, and are expressly made a part of these Findings.

23. In compliance with the Examiner's Order in the above-entitled matter dated May 16, 1979, the Complainant resubmitted the Paris Tsobanglou grievance to the Committee for hearing and final disposition, and hearing on said grievance was held before four members of the Committee, representing a quorum thereof, on June 15, 1979. The Respondent was represented by counsel at said hearing.

24. On July 6, 1979, the Committee issued its award determining the Tsobanglou grievance wherein it ordered the Respondent to pay the grievant, Paris Tsobanglou, the sum of $2,771.42 and to pay to the Milwaukee Electrical Industry Board, representing the various "fringe benefit funds" within the purview of the 1976-1978 Agreement, the sum of $818.88. The Respondent has failed to comply with the order of the Committee.

25. During the June 15, 1979 hearing referred to in Finding 23 hereinabove, all parties were given the full opportunity to make opening and closing statements, to present evidence, to examine and cross-examine witnesses, and to make legal arguments. A full transcript of said hearing was prepared.

26. The Committee rendered its decision and order on July 6, 1979 only after deliberations held in executive session, during which no outside parties were present. The Committee relied only upon information adduced at the hearing held before it on June 15, 1979 in reaching its conclusions.

27. The grievant, Paris Tsobanglou, was employed by the Respondent during the period of time forming the subject matter of his grievance as set forth in Finding 11 hereinabove, and did not participate in any apprenticeship program as set forth by the applicable terms of the 1976-1978 Agreement.

28. The Respondent employed the grievant, Paris Tsobanglou, without resort to the referral procedures as set forth in Article IV of the 1976-1978 Agreement.

Upon the basis of the above and foregoing, the Examiner makes and issues the following

SUPPLEMENTAL CONCLUSIONS OF LAW

1. Those Conclusions of Law contained in the Examiner's decision of May 16, 1979 and numbered paragraphs 1 through 4 are incorporated by reference as though fully set forth herein, are restated in their entirety as Conclusions 1 through 4 herein, and are expressly made a part of these Conclusions.

5. The order issued by the Labor Management Committee on July 6, 1979 relating to the grievance filed by the Complainant, Local Union 494, against the Respondent on behalf of Paris Tsobanglou shall be given the same force and effect as that of any arbitration award, and is specifically enforceable by the Wisconsin Employment Relations Commission.

6. No grounds exist, pursuant to Chapter 298 of the Wisconsin Statutes, for vacating or modifying the order referred to in Conclusion 5 hereinabove, and therefore, said order shall be confirmed; and the Respondent committed, and is committing, unfair labor practices under Sections 111.06(1)(f) and 111.06(1)(g) of the Wisconsin Employment Peace Act by its failure to comply with the terms of said order.

7. The likelihood of the Respondent committing similar unfair labor practices in the future is minimal, and therefore, the issuance of an order commanding the Respondent to refrain from committing such unfair labor practices in the future is not necessary under the circumstances.

On the basis of the above and foregoing Supplemental Findings of Fact and Supplemental Conclusions of Law, the Examiner makes and issues the following

ORDER

1. Giraffe Electric, Inc. shall immediately pay to Paris Tsobanglou back wages in the amount of Two Thousand Seven Hundred Seventy-One and 42/100 Dollars ($2,771.42) and to the Milwaukee Electrical Construction Industry Board fringe benefit contributions in the amount of Eight Hundred Eighteen and 88/100 Dollars ($818.88) in accordance with the July 6, 1979 order of the Labor Management Committee for the Electrical Contracting Industry of Milwaukee.

2. Giraffe Electric, Inc. shall, within twenty (20) days from the date herein, notify the Wisconsin Employment Relations Commission in writing as to the steps that it has taken to comply with this Order.

Dated at Milwaukee, Wisconsin this 3rd day of April, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart Mukamal
Stuart S. Mukamal, Examiner

GIRAFFE ELECTRIC, INC., Case I, Decision No. 16513-D

MEMORANDUM ACCOMPANYING SUPPLEMENTAL FINDINGS OF FACT, SUPPLEMENTAL CONCLUSIONS OF LAW AND ORDER

BACKGROUND

Pursuant to my Order contained in my decision issued in this matter on May 16, 1979,[1/] Local Union 494, International Brotherhood of Electrical Workers, AFL-CIO (the "Union") resubmitted the Paris Tsobanglou grievance to the Labor-Management Committee for the Electrical Construction Industry of Milwaukee (the "Committee") for adjustment and disposition according to the terms of the 1976-1978 Inside Wiremen Agreement (the "Agreement") entered into by and between the Union and the Electrical Contractors Association-Milwaukee Chapter, N.E.C.A., Inc. ("NECA"). The Committee held a hearing on the Tsobanglou grievance on June 15, 1979, a transcript of which hearing was prepared,[2/] and during which hearing the Respondent appeared by its President, Frank Jrolf, and by its counsel.[3/] The record of the proceedings before the Committee was closed on June 21, 1979. The Committee met in executive session on July 6, 1979 to consider the Tsobanglou grievance and on that date it rendered its decision and order in said matter. The Committee ruled that the Respondent in the course of its employment of the grievant, Paris Tsobanglou ("Tsobanglou") had violated Article IV of the Agreement, entitled Referral Procedures, and ordered the Respondent to pay back wages of $2,771.42 to Tsobanglou, and $818.88 to the Milwaukee Electrical Construction Industry Board representing mandatory fringe benefit contributions attributable to the employment of Tsobanglou. The Respondent failed to comply with the Committee's order.

On November 13, 1979, the Complainant filed its Amended Complaint in this matter alleging that the June 15, 1979 hearing before the

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1/ Decision No. 16513-A.

2/ References to the transcript of this hearing before the Committee shall hereinafter be referred to as "Committee tr."

3/ The hearing was actually conducted before only four of the six members of the Committee, two members each representing the Union and NECA. However, Section 13.03C of the Agreement provides that four members, two representing each of the parties to the Agreement, constitute a sufficient quorum for the transaction of Committee business.

Committee was conducted in full accordance with my Order of May 16, 1979, that it rendered a valid, final and binding decision and order with respect to the Tsobanglou grievance, that the Respondent had failed to comply with said order and that the Respondent had as a result committed unfair labor practices pursuant to Sections 111.06(1)(f) and (g) of the Wisconsin Employment Peace Act. The Complainant requested the Commission to order the payment of monies ordered by the Committee to Tsobanglou and to the Milwaukee Electrical Construction Industry Board as directed by the Committee's decision and order with 9% interest per annum from July 19, 1979, and further requested that the Commission order the Respondent to cease and desist from engaging in like or related unfair labor practices.

On November 20, 1979, the Respondent filed its answer to the Complainant's amended complaint wherein it denied inter alia that the Committee possessed jurisdiction over the Tsobanglou grievance, and that the Respondent had committed any unfair labor pactices under the Wisconsin Employment Peace Act by failing to comply with the Committee's July 6, 1979 order in said matter.

Positions of the Parties

The Complainant alleges that the June 15, 1979 hearing concerning the Tsobanglou grievance before the Committee was conducted in full compliance with my May 16, 1979 Order, during which the parties were given the opportunity to present opening and closing statements, to call and examine witnesses and to make legal arguments without restriction. It claims that the Committee met in executive session to consider the Tsobanglou grievance on July 6, 1979, during which it reached a unanimous decision as to the merits of that grievance and that the Committee's decision and order was served upon the Respondent and upon its counsel on July 19, 1979. It further alleges that the Committee was validly constituted and that the Respondent never lodged any objection to the composition of the Committee during the June 15, 1979 hearing. It finally argues that the Committee's decision in determination of the Tsobanglou grievance must be accorded the same respect and finality as that of the award of any other arbitrator, that it is specifically enforceable by the Commission and that as a result, the Respondent's failure to comply with the Committee's order constituted an unfair labor practice within the meaning of the Wisconsin Employment Peace Act.

The Respondent realleged all of those contentions which it raised during the earlier proceedings in this matter, and specifically, those

allegations and affirmative defenses contained in its Answer to the original complaint in this matter which it filed on October 4, 1978. With regard to the specific issue of the enforceability of the Committee's July 6, 1979 order in the Tsobanglou grievance, the Respondent claimed that the order should be vacated because the Agreement was not applicable to Tsobanglou. Specifically, it argues that although the existence and extent of the Respondent's liability for wages and fringe benefits in Tsobanglou's case was based upon the hourly wage rate for a journeyman wireman as provided by the Agreement, there is no evidence to support the Union's contention that Tsobanglou was qualified as a journeyman wireman eligible to receive the wage rate applicable to that classification. It further argues that the Respondent could not have violated Article IV of the Agreement, entitled Referral, given that there was no evidence that Tsobanglou fell within the categories of employes eligible for referral under that article. It concludes that as a result, Tsobanglou, individually, was not an employe covered by the Agreement and that the Committee therefore exceeded its jurisdiction under the Agreement by ordering back wages to Tsobanglou and fringe benefit contributions attributable to Tsobanglou's employment.

ISSUES AND DISCUSSION

The issues raised earlier and decided by my earlier decision in this matter dated May 16, 1979 shall not be addressed at this stage of these proceedings. In particular, I have already determined the following matters and shall not now reconsider them:

1. Whether the Commission possesses jurisdiction over this matter.

2. Whether the Respondent executed an effective Letter of Assent binding it to the terms and conditions of the successive Inside Wiremen Agreements, including the 1976-1978 Agreement.

3. Whether the Respondent's obligations pursuant to said Letter of Assent was excused by duress attending its execution or by a material breach of the various Inside Wiremen Agreements by the Union.

4. Whether the Respondent ever terminated or revoked the Letter of Assent or its obligations thereunder at any time prior to or during the period within which it employed Tsobanglou.

5. Whether the Committee was a proper tribunal to hear and adjust disputes arising under the Agreement, including the Tsobanglou grievance.

6. Whether the Committee was biased or arrayed in interest against Frank Jrolf or the Respondent or whether it had a financial interest in the outcome of the Tsobanglou grievance.[4/]

The only remaining issues in this proceeding concern the enforceability of the Committee's order of July 6, 1979 and whether any grounds for vacating that order exist. The applicable standards governing this question contained in Wisconsin Statutes Sections 298.10,[5/] which reads as follows:

> 298.10 Vacation of Award, rehearing by arbitrators. (1) In either of the following cases the court in and for the county wherein the award was made must make an order vacating the award upon the application of any party to the arbitration:
>
> (a) Where the award was procured by corruption, fraud or undue means;

4/ I have already determined that the Committee possessed no financial stake in the outcome of the Tsobanglou grievance. See Memorandum, Dec. No. 16513-A (5/79) at pp. 21-22. The Respondent claims that the existence of a 1% mandatory contribution to the National Electrical Industry Fund--an industry promotion fund--pursuant to Section 12.01 of the Agreement, gives the Committee a financial stake in the outcome of the Tsobanglou grievance. This contention is without merit. This fund is a national fund having no connection to the activities of either Local 494 I.B.E.W. or the Milwaukee Chapter of NECA in any but the most remote sense. The extent of the mandated contributions to this fund as compared to any liabilities that Respondent may have to Tsobanglou or to the various other fringe benefit funds is at most minimal, and nothing in the record suggests that a desire to exact contributions to this fund from the Respondent had any discernible impact on the outcome of the Tsobanglou grievance. Finally, I note that this fund came into existence only on July 1, 1977, as a successor to the Electrical Industry Educational Fund and Trust (see Committee tr., at pp. 26-31). Since Tsobanglou terminated his employment with Respondent on or about July 1, 1977 (the date of his last pay stub from the Respondent), little or no money was payable as contributions to this fund which could be attributable to his employment.

5/ Chapter 298, Wisconsin Statutes and Section 298.10 in particular are specifically applicable to the situation herein. See Memorandum, Dec. No. 16513-A (5/79), fn. 26 at p. 20. There is nothing in the record to indicate that modification of the Committee's decision and order in accordance with Wisconsin Statutes Section 298.11 would be appropriate.

(b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

(2) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

In particular, the issues applicable to this particular situation as gleaned from the record are as follows:

1. Whether the June 15, 1979 proceedings before the Committee afforded due process to the Respondent and were procedurally fair and regular.

2. Whether the Committee as arbitrators exceeded their powers pursuant to Section 298.10(1)(d) on the grounds that the employment of Tsobanglou was not subject to, or governed by, the Agreement.

There appear to be no other grounds alleged and/or set forth in the record for vacating the Committee's order pursuant to Section 298.10, and the ensuing discussion will therefore be limited to the two issues just enumerated.

Procedural Context of the Committee Hearing

The record herein and particularly the record of the June 15, 1979 hearing before the Committee and of the January 3, 1980 hearing before the Examiner demonstrate that the proceedings before the Committee were eminently fair and regular. Both parties (i.e. the Complainant and the Respondent) appeared, and the Respondent was ably represented by counsel. Both parties had a full opportunity to present evidence, to make opening and closing statements, to call, examine and cross-examine witnesses and to make legal arguments before the Committee. None of the parties were prevented from

presenting anything that they wished to present.[6] The Committee even went so far as to employ a court reporter to prepare a full transcript of the June 15, 1979 proceedings--a highly unusual step for its hearings. That transcript revealed that the parties thoroughly examined all issues relative to Tsobanglou's employment that were relevant to the determination of the issues submitted to the Committee. The members of the Committee met in executive session, with no outside persons present, to consider the Tsobanglou grievance, and relied only upon evidence adduced at the June 15, 1979 hearing in reaching their decision on that grievance.[7] The Committee's decision and order was precisely within the scope of those matters submitted to it. The tenor of the June 15, 1979 proceedings and the method by which the Committee determined the Tsobanglou grievance stand in marked contract to the nature of the earlier proceedings regarding that grievance before the Committee in November 1977 and March 1978 which were earlier deemed to be procedurally defective.[8] The defects that existed in the 1977 and 1978 hearings were not repeated during the 1979 hearings. I therefore conclude that no grounds exist for vacating the Committee's July 6, 1979 order pursuant to Section 298.10(1)(c).

Jurisdiction of the Committee Over Paris Tsobanglou

The Respondent's contention that the Committee exceeded its powers when it adjusted the Tsobanglou grievance is premised upon Tsobanglou's claimed failure to come within one of the four categories (Groups) of applicants for employment set forth in Article IV paragraph 4 of the Agreement as eligible for referral to employers bound thereunder. It argues that the Union failed to demonstrate that Tsobanglou possessed one year's experience in the trade--the minimum experience requirement for registration in any one of the four Groups. Therefore, it alleges that the claimed basis for the Committee's award, i.e. the Respondent's alleged violation of the referral procedures (Article IV) of the Agreement, could not exist inasmuch as Tsobanglou was not eligible for referral under Article IV and could not be referred under that Section. It argues further that Tsobanglou was not entitled to the journeyman rate set forth in Article 5.01A of the Agreement (which rate formed the basis of the Committee's decision and order) since he did not possess the qualifications for journeyman status.

6/ See WERC tr. of 1/3/80 hearing at pp. 67-68.

7/ Id. at pp. 36-42.

8/ See Memorandum, Dec. No. 16513-A (5/79), at pp. 22-23.

While interesting, the Respondent's arguments are not persuasive when applied to the situation at hand. Were the alleged violation of Article IV committed by the Union in referring an employee not eligible for referral under that Article, the Union might be held to have committed a material breach of that article precluding any recovery thereunder, or, in the alternative, it might be held estopped from claiming any violation of that article by an employer. Such is not the case here. Article IV paragraph 1 of the Agreement states that "The Union shall be the sole and exclusive source of referrals of applicants for employment," with the exception of periods during which the registration list is exhausted, which exception is immaterial herein. The Respondent, as an employer bound by the Agreement, was thus obligated to utilize the Union's exclusive referral procedure. By failing to do so in the case of Tsobanglou--whom it obtained outside the contractual referral procedure--the Respondent violated Article IV paragraph 1 of the Agreement.[9/]

The Union never did provide evidence that Tsobanglou possessed the requisite one year's experience in the trade (in order to come within the purview of the "Groups" listed under Article IV of the Agreement).[10/] However, given that the Respondent apparently committed the violation of the exclusive referral procedures of the Agreement, the Union's failure to document Tsobanglou's qualifications under that section of the Agreement is not pertinent to this matter. The four "Groups" of applicants for employment listed under Article IV of the Agreement are set forth as obligations devolving upon the Union

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9/ There is no evidence that the Respondent employed Tsobanglou with the specific intent of violating the Agreement. At the time when Tsobanglou was hired (May 1977) the Respondent apparently gave no thought to this issue and may indeed have believed that it had terminated its contractual relationship with the Union. At that time, it had not utilized the Union's referral procedures for approximately three years. However, this does not change the fact that the Respondent was obligated to observe the Agreement and that it apparently did violate the Agreement by hiring Tsobanglou outside the referral procedure.

10/ During the June 15, 1979 hearing before the Committee, the Union stated that Tsobanglou had "documents showing that he had worked at the trade" for one year. Committee tr., p. 31. However, no such documentation was offered as proof, either at that hearing or during the instant proceedings. Tsobanglou's employment history subsequent to his employment by the Respondent, which was the subject of some discussion during the Committee hearings, is irrelevant with regard to his qualifications at the time of his employment by the Respondent.

as the referral agent pursuant to the Agreement. The "Groups" are not meant to serve as qualifications for employes hired by signatory employers outside the Agreement's exclusive referral procedure and, therefore, who are hired in violation of the Agreement. If the Respondent's argument that the Committee lacked jurisdiction over employes not falling within one of the four "Groups" were to prevail, it would sanction unlimited and unchecked violations of the Agreement. An employer would need only to determine that a prospective employe lacked the qualifications set forth in the four listed "Groups" in order to hire that employe and at the same time to avoid fulfilling its contractual obligations. The Respondent's argument if upheld would vitiate the wage, benefit and referral provisions of the Agreement and would encourage the employment of unqualified applicants in the electrical trade. It is an unwarranted interpretation of the Committee's jurisdiction under the Agreement and is therefore rejected.

The Agreement's intent is to regulate the employer-employe relationship for all signatory employers and their employes performing work in the electrical trades.[11/] More particularly, the Agreement is made effective on "all inside electrical construction work in Milwaukee, Waukesha, Washington and Ozaukee Counties in the State of Wisconsin." The issue of whether Tsobanglou is covered by the Agreement under the circumstances of this case is thus determined by whether or not Tsobanglou performed work covered by the Agreement. Based upon the record herein, there is no question that he did perform inside electrical work in the course of his employment, particularly, wiring of garages.[12/] Furthermore, he performed such work at the direction of his employer, the Respondent,[13/] and the work he performed was of a similar nature to that which he performed in his subsequent employment with other contractors as a journeyman wireman.[14/] I

11/ Preamble to the Agreement. See also Section 1.01 of the Agreement (recognition of the Union as the "sole and exclusive representative of all . . . Employees performing work within the jurisdiction of the Union") and the definition of the "electrical contracting industry" contained in Section 3.02 of the Agreement.

12/ See Committee tr., at pp. 13-15.

13/ Id. at pp. 13-16, 71-74. It is clear from the record as a whole that Tsobanglou was an employe of the Respondent, even though he was lent out periodically to other contractors by Frank Jrolf, the Respondent's President.

14/ Id. at pp. 15-16.

therefore find that Tsobanglou did perform work within the Agreement's coverage and that he is therefore covered by the wage and benefit provisions of the Agreement.

The Agreement provides for only two wage scales for employes: journeyman and apprentice rates.[15/] The Committee's award was premised upon the journeyman's rate for all hours worked by Tsobanglou. There is no indication that Tsobanglou participated in the apprenticeship program as set forth in Article X of the Agreement (in which case and only in which case he would be entitled to the lower apprentice's rates). Given that Tsobanglou is entitled to receive the Agreement's wage and benefit rates, he must therefore be held entitled to the journeyman rate under the Agreement, as no alternative rate exists.

Remedy

The Committee computed the amounts set forth in its order of July 6, 1979 based upon the difference between what Tsobanglou and the various fringe benefit funds would have received had the Agreement's journeyman rate been paid to Tsobanglou for all hours that he was employed by the Respondent and the amounts actually paid to him by the Respondent.[16/] The dollar amounts were based upon an audit of the Respondent's records by an outside auditing firm and were not specifically challenged by the Respondent. There exist no grounds for modification of those figures at this stage and they are therefore incorporated into my Order.

Regarding the Union's request for 9% interest from July 19, 1979 on the amounts set forth in the Committee's award, it is generally not the Commission's policy to assess interest on backpay awards, and the Union's request is hereby denied.[17/] Furthermore, given that the likelihood of occurrence of future unfair labor practices of this type by the Respondent is minimal and that the Respondent did not commit such unfair labor practices in bad faith, the issuance of a cease-and-desist order is not appropriate under the circumstances. I have therefore limited my Order to the award of back pay and benefits as set forth by the Committee's July 6, 1979 order.

15/ See Section 5.01 of the Agreement. There are additional premiums payable to cable splicers, foremen or general foremen, but none of these premiums apply to Tsobanglou.

16/ See Committee tr., pp. 19-22, 32-35.

17/ See Jt. School Dist. No. 8, Villages of Fox Point, Bayside, River Hills and City of Glendale, 16000-A (10/79).

Dated at Milwaukee, Wisconsin this 3rd day of April, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart Mukamal
Stuart S. Mukamal, Examiner